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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1662

In re
G. DOUGLAS & MARY TIBBITTS, Bankrupts,
Petitioners,

V.

JAMES E. CUSSEN, Trustee,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MILES L. SNYDER
555 Capitol Mall
Sacramento, CA 95814

THOMAS W. OLSON, JR.
555 Capitol Mall
Sacramento, CA 95814

Attorneys for Respondent

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QUESTION PRESENTED

Whether the district court may extend the time to appeal from an order in a proceeding in bankruptcy when more than 60 days has elapsed from the date of entry of such order.

STATEMENT OF THE CASE

Petitioners' statement of the case adequately covers all of the facts

necessary for a determination of the question presented.

ARGUMENT

The memorandum and order denying petition for review of the referee's order granting the trustee's application to compromise controversies was entered on October 11, 1973. Notice of appeal was filed by the bankrupts on December 11, 1973.

Petitioners' contention that they had forty days to perfect their appeal is specifically discussed and dismissed in Collier on Bankruptcy, 14th Ed., Volume 2, at Section 25.03 wherein it is stated at page 908 that:

> "The 1968 Federal Rules of Appellate Procedure retain the previous bankruptcy appellate practice under former Section 25a of the Act, insofar as the maximum appeal time starts to run from the entry of judgment, order or decree complained of. The previous maximum appeal time of forty days available

under former Section 25a of the Act has been abrogated by the 1968 Federal Appellate Rules."

The cases cited by the petitioners to support their argument were decided prior to July 1, 1968, and are therefore not applicable to appeals taken after the effective date of the Federal Rules of Appellate Procedure. The closest case that we have discovered is In The Matter of Hapco Manufacturing Co., 437 F.2d 1206 (8th Cir. 1971) wherein the court acknowledges that Rule 4(a) has superseded Section 25 of the Act.

Unless the filing of the late notice of appeal is taken to be a motion to extend time to appeal, it would have no legal effect whatever, since it is well beyond the 40 day limitation of Section 25a. Rule 4(a), Federal Rules of Appellate Procedure, provides for an extension of the time for filing the notice of appeal "for a period not to

exceed 30 days from the expiration of the time otherwise prescribed by this subdivision." (Emphasis added) The rule does not state that an additional 30 days can be added to a time period provided for elsewhere in the law, but allows maximum time of 60 days from date of entry of judgment in any civil case, including bankruptcy cases, for taking an appeal.

If it is assumed that Section 25a is still in force and effect and applicable in the instant case, as petitioners assert, is it in conflict with Rule 4(a)? Respondent contends it is not. Rule 4(a) does no more than grant an additional right which is not found within the terms of Section 25a. Thus, an appellant in a bankruptcy proceeding initially has 40 days to file a notice of appeal under Section 25a, and, failing that, has an additional 20 days within which to

request an extension of time to appeal under Rule 4(a). The result is that Rule 4(a) does supersede the provisions of Section 25a by giving a longer period of time to appeal.

Respondents contend that Rule 4(a) specifying the maximum time for extending the appeal time is jurisdictional. Petitioners argue that the rule gives the district court the power to extend the time to appeal even after the 60 days has elapsed from the date of entry of judgment. This point was considered in the case of Dyotherm Corporation v. Turbo Machine Company, 434 F.2d 65 (3rd Cir. 1970), where a motion for extension of the appeal time made after 60 days was held to be a nullity.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the District

Court has no power to extend the time for filing a notice of appeal beyond 60 days from the date of entry of its order, and that this petition for writ of certiorari be denied.

DATED: July 24, 1974.

MILES L. SNYDER
Member of the Bar of
The Supreme Court of
The United States

THOMAS W. OLSON, JR.
Counsel for Respondent